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To: U.S. Department of Justice
From: M. David Stirling

Subject: Microsoft Settlement

This letter is submitted pursuant to the Tunney Act public comment provision.

I served as Chief Deputy Attorney General of the California Attorney General's Office between January 1991 and December, 1998. The Chief Deputy is the chief operating officer of the California Department of Justice and more than 4,500 employees. Within the Legal Divisions of the Attorney General's office, I, as Chief Deputy, provided overall general supervision and direction to the approximate 1,000 deputy attorneys general (lawyers), including the deputies in the Anti-trust Section and the Consumer Law Section of the Public Rights Division. From this experience, I am knowledgeable regarding the law of anti-trust and the law of unfair competition/business practices.

During my eight years as Chief Deputy, one of my primary concerns within the office was the consumer-activist, anti-business attitude of deputies in these sections, as well as their case filing motivations and litigation practices. Generally speaking, instead of working more with amenable businesses to gain compliance with the laws, the attitude was to file suit immediately, and, using the vast resources of the state, leverage the defendant business into an eventual settlement at a higher dollar amount than perhaps the legal violation justified. While I attempted to reign in the use of this approach, my efforts were only partially successful due to its entrenched nature and the protections of civil service

My "second-in-command" position in the largest state attorney general's office in the country also gave me the opportunity to work with and observe elected state attorneys general, including how they regard their powerful roles, including how they prioritize the use of the legal resources of their offices. And while their general philosophy as reflected by their political party affiliation is a factor, in large, high-visibility cases, at least three other considerations play a more direct role in their litigation decisions. Indeed, in the case of the U.S. Justice Department's settlement of its anti-trust case with Microsoft, the decision by nine state attorneys general, including California's, to go forward with the anti-trust/unfair competition litigation against Microsoft is influenced by one or more of these other considerations. It is the position of this writer that none of these considerations constitute legitimate legal justification for their separately proceeding with the litigation.

First Consideration: Some of these nine elected state attorneys general are up for re-election in November, 2002. For those, there is much political visibility to be had, and spin to be made of a scrappy state attorney general not taking the easy road of settlement, but fighting the giant

software company alone in court on behalf of his/her state's residents. And if these nine state attorneys general prior to the November elections are able to settle their cases against Microsoft (mostly likely not having anything to do with the particular merits of their cases) for amounts larger than what the Justice Department settlement provided, then the political mileage they will garner for carrying on the fight will be played to the hilt.

Second Consideration: Some of the nine state attorneys general have based in their states high technology companies that are not only competitors of Microsoft, but were the chief complainants against Microsoft in the Justice Department's anti-trust litigation. None of those competitors are satisfied with the federal Microsoft settlement, and each is pushing for their attorney general to go forward with the litigation against Microsoft. It could also be assumed that these companies have been, or have indicated their intention at a future time to be, political financial supporters of their state attorney general.

Third Consideration: Despite Judge Jackson's judicial finding that consumers were not harmed by Microsoft's marketing practices, the consumer-activists among the nine state attorneys general are driven by Microsoft's potential as an even bigger "cash cow" than the tobacco industry. In the mid-'90s, one state attorney general hired a local plaintiffs' lawyer on a contingency fee arrangement to sue the tobacco companies. The notion of the states hiring contingency-fee lawyers to simultaneously wage legal warfare against the giant tobacco industry, without incurring the legal expenses or risks of litigation, quickly lead to a nationwide alliance between the states' elected attorneys general and well-connected plaintiffs' lawyers. In December,1998, this powerful alliance settled its multiple lawsuits against the tobacco industry for $246 *billion* over 25 years. For the 200 to 300 contingency-fee lawyers who teamed with the state attorneys general, the Hudson Institute's Michael Horowitz estimates they will share $500 million each and every year – probably in perpetuity. This powerful alliance between state attorneys general and their favorite members of the plaintiffs' bar still exists. It has been estimated that there are as many as 100 separate lawsuits against Microsoft filed by these lawyers in multiple jurisdictions around the country (for maximum leverage). These suits are not nearly as valuable, nor are there chances of establishing liability against Microsoft as great, under the Justice Department's settlement with Microsoft as they would be if these nine attorneys general are allowed to try to establish in court a greater degree of liability against Microsoft. Finally, those state attorneys general who have reputations as consumer-friendly and anti-business have reason to keep their state's plaintiffs' bar happy. The plaintiffs' bar is a major political funding source for those attorneys general. Consider how much of the enormous attorneys fees they received and will continue to receive from the tobacco settlement went to their favorite state attorneys general as political contributions.

All of the foregoing considerations undermine the nine state attorneys generals' given reasons for being allowed to litigate against Microsoft beyond the Justice Department-Microsoft settlement. As in California, when a "consumer-friendly, anti-business" attorney general gives the green light to activist attorneys in the Anti-trust and Consumer Law sections of his office, the question of the legal validity of his case and whether it is so compelling as to warrant continued litigation beyond the Justice Department-Microsoft settlement becomes lost in the political agendas of the numerous players involved.

Thank you for your consideration.

M. David Stirling